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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 619

GRANDVIEW DAIRY, INC.,

Petitioner,

vs.

MARVIN JONES, WAR FOOD ADMINISTRATOR, AND
CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE
OF THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.

✓
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✓
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MARVIN JONES, WAR FOOD ADMINISTRATOR, AND
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OF THE UNITED STATES,

Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

The undersigned petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed a judgment entered July 17th, 1945 (R. 123, 124) by the United States District Court for the Eastern District of New York.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 17th, 1946 (R. 141). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13th, 1925.

Statement of Facts

This action was instituted in the United States District Court for the Eastern District of New York (R. 22-26) to review a ruling made by the War Food Administrator pursuant to authority conferred upon him by Executive Order #9334 April 19th, 1943.

The original petition, upon which the ruling of the War Food Administrator was made, was filed pursuant to Section 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 601, 608c.

The jurisdiction of the District Court to review a ruling made by the Secretary of Agriculture, to whose duties and functions the War Food Administrator succeeded, is found in Section 8c (15) (B) of the Agricultural Marketing Agreement Act of 1937, as amended. The District Court is thereby vested with original jurisdiction in equity to review such ruling.

The petition presented to the War Food Administrator arose under a Federal Marketing Order known as number 27 which regulated the handling of milk in the Metropolitan New York Milk Marketing Area. The particular provisions of the order as it existed during the period involved in this proceeding is set out in the record at page 99 and was known as Section 927.7 (f).

The petitioner is a handler of milk within the meaning of the terms of the Agricultural Marketing Agreement Act and within the meaning of the provisions of Federal Marketing Order #27 (R. 22).

In addition to the sale and distribution of milk and milk products, it operated milk receiving plants and milk manufacturing plants. The plants involved in this proceeding were situated in Webster Crossing, Livingston County, New York (R. 53). At that location it had one plant which

received raw fluid milk from producers. That plant was equipped solely for the receiving of milk from producers and the shipment of milk to the marketing area (R. 10, 98). Another plant was situated about 60 feet distant from the aforementioned plant. This second plant was a milk products manufacturing plant. This manufacturing plant was equipped to separate milk into cream and skim milk and to manufacture various dairy products (R. 10).

Federal Order #27 was amended in the early part of 1940, effective May 1st, 1940, to provide for diversion payments and allowances to handlers, for milk received from producers at a plant equipped only for the receiving and shipping of milk to the marketing area, which milk was moved to a second plant outside of the marketing area and there separated into cream and skim milk or manufactured (R. 99).

In June 1940 petitioner operated its enterprises at Webster Crossing, New York, in the manner and in accordance with the provisions of Section 927.7 (f) of Marketing Order #27 so as to entitle it to the market service payments provided therein.

In the interim between the adoption of the amendments and the diversions of milk by petitioner in June 1940 the former Market Administrator for the Metropolitan Milk Marketing Area was succeeded by a new Market Administrator (R. 90) who refused to follow the rulings of his predecessor and who denied petitioner's claims for market service payments for the month of June 1940.

A petition for review of such denial was instituted by petitioner in accordance with the provisions of the Agricultural Marketing Agreement Act. After extensive and prolonged hearings and arguments before the hearing master and the Secretary of Agriculture the determination of the Market Administrator was overruled and he was directed

to make payment to petitioner for market service claims for the month of June 1940.

After considerable delay payment was ultimately made to petitioner for the month of June 1940 and a voluntary payment was made for the month of July 1940. Its claims for the subsequent months during which the same provision of the order was in effect (August 1940 to February 1941) had then accrued. These claims were disallowed by the Market Administrator.

A petition was thereupon filed to review the disallowance of petitioner's claims. In this proceeding after protracted hearings the disallowance was upheld and petitioner's claims for market service payments were denied.

The present action was instituted in the United States District Court for the Eastern District of New York to review such denial and motions for summary judgment were made by both sides, which resulted in a final judgment granting the defendants' motion for summary judgment and denying the plaintiff's motion. An appeal was taken to the Circuit Court of Appeals for the Second Circuit which affirmed the judgment of the Court Below.

By stipulation the record of the two prior proceedings before the Secretary of Agriculture was not printed, but the original records were transmitted to the Circuit Court of Appeals (R. 126). If this Court grants this application, the original records will be transmitted to this Court by similar stipulation.

Reasons for Granting the Writ

1. There is involved in this case an important question affecting the dairy industry in the State of New York, which is of vital interest to "thousands of producers" (R. 115, f. 344). It concerns not only petitioner, but other handlers as well (R. 115), and affects a large number of handlers

similarly situated who have proceedings pending before the Secretary of Agriculture which involve a sum in excess of \$1,000,000.00 (R. 51). The particular provisions of Federal Order #27 involved in this proceeding have never been presented to this Court. The decision of the Circuit Court of Appeals in this case is the first and only ruling by an Appellate Court on Section 927.7 (f) of Federal Marketing Order #27 as amended effective May 1, 1940.

2. Involved in this proceeding is the question as to how far and to what extent an Administrative Official, by personal legislation, may inject requirements or conditions not found within the boundaries of the Statute or Order. That question was presented to the Circuit Court of Appeals but no ruling was made thereon.

In a case four square with the present case, the Circuit Court of Appeals for the 7th Circuit held that a Market Administrator may not implement a marketing order by the addition of requirements not found therein (*Barron Coop. Creamery v. Wickard*, 140 Fed. 2nd 485, 488, 489). This Court has likewise so ruled in *Addison v. Holly Hill*, 322 U. S. 607, 616, 617.

3. The question as to what extent the doctrines of *res judicata* and *stare decisis* apply to administrative determinations prominently appears in this case. This question deserves profound consideration, and a ruling by this Court would settle numerous conflicts found in intermediate court decisions. The opinion of Judge Augustus N. Hand in this case (R. 1898) reflects the conflict. The concurring opinion of Judge Learned Hand (R. 1898) concedes that the question as to how far the doctrine of *res judicata* should be made applicable is confusing and that the present opinion of the Circuit Court of Appeals will not serve to clarify it. The War Food Administrator, in reaching his determination, conceded that "It is true that the part which

res judicata should play in administrative proceedings is not yet clearly defined" (R. 114). It is, therefore, apparent that despite all that has been written during the current growth of Administrative Tribunals the question is still in a state of flux and is confusing to Judges, administrative officials, Lawyers, textbook and law review writers.

4. An important question under the Federal Constitution as to whether the determination was made in accordance with law is likewise presented in this case. This question is considered under the proposition that there was not substantial evidence in the record to support the determination. The Statute, providing for a review of a ruling by the Secretary of Agriculture, widely differs from other laws investing the Courts with jurisdiction to review determinations made by administrative tribunals.

Questions Presented

On the basis of the foregoing, petitioner desires this Court to review the following questions:

1. Whether an Administrative Official may go beyond the provisions of the Statute and Administrative Order conferring authority upon him and inject personal provisions and requirements not found within the confines of the Statute or Order.

2. Whether a determination by the Secretary, deciding questions of fact, may be reversed within the administrative hierarchy when the same facts and the same parties are involved in a subsequent proceeding concerning the same order.

3. Whether the determination made by the War Food Administrator was made in accordance with law, when the findings of fact, conclusions and ruling are not supported by substantial evidence.

Prayer for a Writ

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and that petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: Brooklyn, New York, October 15th, 1946.

GRANDVIEW DAIRY, INC.,
Petitioner,

By HARRY L. MARCUS,
Attorney and Counsel for Petitioner,
50 Court Street, Brooklyn 2, N. Y.

SUPREME COURT OF THE UNITED STATES

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MARVIN JONES, WAR FOOD ADMINISTRATOR, AND
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OF THE UNITED STATES,

Respondents

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

The grounds upon which the jurisdiction of this Court is invoked, a statement of the facts involved, with questions presented appear in the accompanying petition and for the sake of brevity are not here repeated.

Opinions Below

The opinion of the Circuit Court of Appeals (R. 133-140) has not yet been reported. The opinion of the District Court (R. 118-122) is reported in 61 F. Supp. 460.

Specifications of Errors

The Court Below erred as follows:

1. It failed to consider the usurpation of power by the Market Administrator by legislatively injecting additional requirements not found in the Order as a condition precedent for the petitioner to qualify for market service payments.

2. It erred in reaching a determination that the doctrine of *res judicata* did not apply to the case at bar.

3. It erred in holding that there was substantial evidence to support the findings of the War Food Administrator and in so doing it overlooked the mandate of the Statute and the decisions of this Court defining substantial evidence.

Argument

POINT I

In June, 1940, after the provisions of the Order had been in effect two months, the Market Administrator sent a letter to all handlers (R. 90) stating:

“It is my opinion that the separation and manufacture of milk on premises in the immediate proximity or contiguous to the plant where received from producers does not entitle the handler receiving the milk from producers to the payment of claims for Market Service payments pursuant to the above mentioned section.”

No authority was vested in him under the Order to make such interpretation. The Secretary of Agriculture recognized the Market Administrator's limited authority when he ruled in the first proceeding which involved the month of June 1940 that:

“It is concluded that the market administrator should have allowed market service payments and

charges for the month of June 1940, for diversion of milk from Plant 1 to Plant 2 of the petitioner used for manufacturing purposes as provided in the Order and duly presented in accordance with the provisions of Part 927.7 (f) of the Order. This milk was diverted from Building No. 1 to the manufacturing plant of petitioner referred to as Building No. 2 located at Webster's Crossing, New York." * * *

"The Market Administrator erred in ruling that the milk diverted by the petitioner in the month of June 1940, from Building No. 1 to Building No. 2 of its plant located at Webster's Crossing, New York, for manufacturing purposes was not subject to market service payments and charges as provided in the order."

The right of the Market Administrator to determine a handler's eligibility for market service payments and to determine what is a plant, was not given to him under the Order until it was amended on February 28th, 1941, effective March 1st, 1941 (R. 65, 66).

Prior to that amendment his only power was to administer the terms and provisions of the Order (Section 927.2 (c)):

"The market administrator has no 'inherent powers' and neither the market administrator nor the Dairy and Poultry Branch has been given power to issue what the text writers call 'legislative' regulations. The only authority we know of is that granted in Section 927.2 (c) to administer 'the terms and provisions' of the order." [In re: *Middletown Milk & Cream Co., Inc.* (A.M.A. Doc. No. 27-42), 3 A.D. 84.]

The Circuit Court of Appeals for the 7th Circuit ruled in the case of *Barron Coop. Creamery et al. v. Wickard*, 140 Fed. 2nd 485, 488, 489 that prior to an amendment of a marketing order expressly implementing the Market Administrator's right to make an interpretation, he has no such power. A similar ruling was made by this Court in

Addison v. Holly Hill, 322 U. S. 607, 616, 617 wherein it was held that there is no warrant for an Administrator to extend a Statute beyond its provisions even though experience may disclose that it should have been made more comprehensive.

The Circuit Court of Appeals in the case at bar was in error in failing to consider the unwarranted extension of the Market Administrator's power by his own acts. The error is further accentuated by the tantamount admission by the Secretary of Agriculture that the Administrator did not have the power since it was only by the approval of the amendment of February 28th, 1941 that the right of the Administrator to make a determination as to what is a plant was expressly provided.

Hence, this case presents a question which has been decided adversely to Administrative Officials both by this Court and the Circuit Court of Appeals for the 7th Circuit.

POINT II

The Circuit Court of Appeals devoted a considerable portion of its opinion to a discussion of the question of *res judicata*. The concurring opinion of Judge Learned Hand (R. 140), points out the confusion existing among the Courts and authorities on the question of *res judicata* in Administrative determinations. Much has been written on the subject (Administrative Res Judicata, Parker; Illinois Law Review May 1945, Volume XL #1 56-83; Schopflocher, The Doctrine of Res Judicata in Administrative Law, Wisconsin Law Review January, 1942, pp. 1-42; Dwan Administrative Review of Judicial Decisions Columbia Law Review July 1946 Volume XL #4; Administrative Decisions As Res Judicata, California Law Review Volume 27 #6 September 1941).

This Court has had the question presented to it in various forms, but there has been no clear cut decision on the

precise question involved in this case. The case of *United States v. Stone & Downer Co.*, 274 U. S. 225, cited by the Circuit Court of Appeals is clearly different on its facts and does not involve a situation such as is presented in the case at bar.

In the proceeding at bar there was a determination by the final Administrative Officer declaring that the petitioner is entitled to market service payments under the Order as it existed in June 1940. In the present case, the same petitioner, the same order and the same movements of milk occurred in the months from August 1940 to February 1941. No change of parties, circumstances, acts or Statutes occurred in the intervening time. It is clearly apparent that the doctrine of *res judicata* if it be held to apply to administrative determinations should be held applicable to the facts in this case.

This Court has never had presented to it a similar situation. For the sake of clarity and for the guidance of intermediate Courts and administrative tribunals, a final determination by this Court is of utmost importance.

POINT III

The Circuit Court of Appeals erred in reaching a conclusion that the findings of fact made by the War Food Administrator were in accordance with law.

The Statute under which a review is authorized in a proceeding under the Agricultural Marketing Agreement Act differs from Statutes permitting reviews of other administrative tribunals. In the instant case the Congress of the United States vested the Court with jurisdiction in equity to review a ruling by the Secretary and directed that if the Court determines that such ruling is not in accordance with the law the proceeding shall be remanded. The use of the language vesting the Court with jurisdiction

in equity displays to a marked degree the intention of Congress to provide for a broad review unfettered by any statutory presumptions as to the conclusive effect of the findings made by the War Food Administrator.

When the Circuit Court of Appeals held that the findings of the War Food Administrator are supported by substantial evidence it disregarded the record of the proceedings before it and in its stead supported an abstract theory based upon conjectural possibilities and differences not grounded in substantial evidence.

The conclusions reached by the War Food Administrator contain mixed matters of fact and law which remove them from the realm of primary evidenciary facts and subject them to judicial review thereby authorizing the Court to substitute its judgment for that of the War Food Administrator, *Helvering v. Tex Penn Co.*, 300 U. S. 481, 491.

In the decision of this Court in *St. Joseph Stockyards Co. v. United States*, 298, U. S. 38, 52 the delineation of the duties and obligations of a Court of Review prescribed therein has not been followed by the Circuit Court of Appeals.

The enormous growth of administrative tribunals has lead to new concepts of law. This Court has during the past few years from time to time formulated basic requirements to guide the constantly increasing number of administrative decisions. However, it must be apparent that unless a reconsideration of the fundamental concepts of due process of law and substantial evidence is made by this Court, administrators will overlap judicial and legislative functions in ever increasing fields until by its very growth and force it will tend to destroy the Judicial Power vested in duly constituted Courts of Law by the Constitution of the United States.

The broad ramifications in the case at bar and the importance of the questions involved extend beyond the boundaries of the present controversy. The questions presented herein should be reviewed by this Court.

Conclusion

It is, therefore, respectfully submitted that the petition for the writ of certiorari prayed for in this case should be granted by this Court.

Dated: Brooklyn, New York.

October 15th, 1946.

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